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No. 98-510

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SUPREME COURT, U.S.

In The

# Supreme Court of the United States

October Term, 1997

RUTH J. KUHNS,

*Petitioner,*

*vs.*

CORESTATES FINANCIAL CORP., successor to MERIDIAN BANCORP, INC., successor to THE FIRST NATIONAL BANK OF ALLENTOWN,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## REPLY BRIEF FOR PETITIONER

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To the Honorable, the Justices of the Supreme Court:

The petitioner, Ruth J. Kuhns (Kuhns, or Petitioner) would reply to the brief of Corestates Financial Corp. (Corestates or Respondent) filed by it in opposition to Kuhns' Petition for a Writ of Certiorari, as follows:

This brief will be deliberately kept short. It is written from a hospital bed.

Corestates has never filed an Answer in this entire proceeding, including the first case (which Corestates calls "Kuhns I"). Notably, Corestates has not pleaded the statute of limitations in the present or the prior case. Corestates nonetheless makes many assertions of fact in its brief in opposition which are not on the record. Not only has Corestates not pleaded or proven any of the facts asserted, there never was a trial or a hearing to determine any disputed issue of fact. District Court Chief Judge Cahn, in the first case, took evidence only on the narrow issue as to what the "reasonable rate of return," which was to be credited to the individual account balances of the participants (members of the Plaintiff class, Kuhns, in the present case). Judge Cahn found that this rate should be 7.4% instead of the 4% (later 5%) arbitrarily used by Corestates' trustee in calculating the benefits due the participants. (The Third Circuit in the first case reversed even that finding.)

It was and is false for the Respondent to assert in its brief that there was otherwise ever a trial or any other determination on the merits, either in the first case, or in the present case.

In the present case, District Judge Joyner, at a Status Conference called by him in lieu of an oral argument on Corestates Motion to Dismiss (and held two days before he

filed a 10 page opinion and order granting the motion to dismiss) admitted that he had not read the Complaint in the present case. In spite of the obvious abuse of discretion by Judge Joyner in considering only the motion and brief of Respondent, the District Court had no basis for dismissal. The only facts on the record in the present case are those averred in the unread Complaint. Further, in dismissing the Complaint in the present case, the District Court ignored the undisputed fact that the interests of the participants were fully vested in them, a fact pleaded in the unread Complaint. The Third Circuit affirmed under Rule 12(b)(6) on the basis of the statue of limitations (29 U.S.C. § 1113), a defense not raised of record by Corestates.

It is a national issue, Petitioner submits, whether it is appropriate for the Third Circuit to have affirmed dismissal on an issue not even pleaded (statute of limitations), especially in view of the long standing decision of this Court holding that while a statute of limitations may bar the remedy, it does not divest the right. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137, 1142 (1945).

The taking of funds from the Profit Sharing Trust each year has worked, and continues to work a divestiture of vested property rights of the participants (Kuhns, and the rest of the plaintiff class). In the Profit Sharing Plan, the rights of the participants are fully vested, and have been fully vested for years. How can they be divested by the Trustee bank? The rights of the participants here are vested. Divestiture was never permitted, not in the years gone by prior to the first case, not for 1997 (the present case), and not in the years which follow. 29 U.S.C. § 1103(c)(1). The funds of the profit sharing trust "shall never inure to the benefit of any employer." *Id.* The funds of the profit sharing trust must be applied exclusively for the benefit of the participants (Kuhns and the others in the plaintiff class). *Id.*

The decision in the first case stands only for the narrow proposition that Kuhns and the others in the plaintiff class were time barred from claiming relief for funds taken to that time. The decision in the first case did not and could not as a matter of law award the fund to the Respondent. 29 U.S.C. § 1103(c)(3).

Each year, the Profit Sharing Plan generates new revenue. Each year, from 1997, the year in question, and in each year thereafter, there has been an unlawful taking from the profit sharing trust fund of the newly generated revenue, property vested exclusively for the benefit of the participants (Kuhns and the rest of the plaintiff class.) As to each subsequent separate taking, beginning in 1997, there is neither a claim preclusion, an issue preclusion, or a time bar to recovery. Based on the statute of limitations, 29 U.S.C. § 1129, the claim for relief of Kuhns in the present case was timely filed. Based on the taking of funds generated by the fund in 1997, the dispute is over a new and different amount, fully vested in the participants, which must be used exclusively for the benefit of these aged, and ever aging bank retirees, their surviving spouses and participant heirs.

So far as the Petitioner is aware, the following national issue is a question of first impression before the Supreme Court: whether it is proper following a merger or other acquisition, for the surviving entity to take funds vested for the exclusive benefit of participants in a plan created by the acquired entity, and to apply those funds taken for the benefit of the employer, or other plans in the surviving entity.

The petition should be granted.

Respectfully submitted,

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